

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 DISTRICT OF NEVADA

10 * * *

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 vs.

14 ROGELIO PAYAN,

15 Defendant.

)
) Case No. 2:16-cr-00246-GMN-NJK
)
) ORDER AND
) REPORT & RECOMMENDATION
)
) (Docket No. 42)
)
_____)

16
17 This matter was referred to the undersigned Magistrate Judge on Defendant Rogelio Payan's
18 motion to suppress. Docket No. 42. The Court has considered Defendant's motion, the United
19 States' response, and Defendant's reply. Docket Nos. 42, 65, 66.

20 **I. BACKGROUND**

21 On December 22, 2015, during the investigation of this matter, North Las Vegas Police
22 Officer D. Fellig applied for a search warrant for Defendant's residence. Docket No. 42-1 at 5-15.
23 The supporting affidavit sets forth substantial detail surrounding the investigation, including
24 information given to law enforcement by two confidential informants (CIs). *Id.*

25 The search warrant affidavit states that, during the week of December 13, 2015, Officers
26 Ochoa and Forsberg made contact with CI #1. Docket No. 42-1 at 6. CI #1 has provided law
27 enforcement with "specific, detailed information[]" that has been independently corroborated by
28 investigators. The information has included crimes against persons, weapons offenses and narcotic

1 related activity. Based on the information provided, criminal investigations have been initiated by
2 law enforcement and CI #1 has been deemed reliable.” *Id.*

3 The affidavit further states that CI #1 has “corroborated previous information obtained by
4 law enforcement, about [Defendant] and his involvement in trafficking narcotics and firearms. CI
5 #1 outlined [Defendant’s] previous criminal history and physical description, to include gang related
6 tattoos, which was later substantiated in a records check.” *Id.* Further, the affidavit states that, in
7 a prior investigation, “CI #1 has provided information corroborating that the target of possession of
8 a firearm by a prohibited person offense, possessed the weapon after it was obtained in a residential
9 burglary. The firearm was subsequently recovered in a resulting investigation and the intelligence
10 provided by CI #1[] allowed law enforcement to conduct further appropriate follow up
11 investigation.” *Id.* at 7.

12 The affidavit states that, on or about December 11, 2015, CI #1 was the back seat passenger
13 in a vehicle traveling in North Las Vegas. *Id.* Initially, CI #1 was asleep, but awoke when the rear
14 of the vehicle in which he/she was riding was struck by another vehicle. *Id.* After CI #1 observed
15 that the other vehicle was driven by Defendant, he/she believed that the vehicle intentionally struck
16 the vehicle in which he/she was riding. *Id.* CI #1 provided Defendant’s street name, and stated that
17 Defendant was operating an orange Ford SUV, which CI #1 knew belonged to Defendant, and knew
18 that Defendant frequently drove said vehicle. *Id.* As the vehicles traveled, CI #1 heard gunfire, and
19 saw that Defendant was firing a dark-colored semi-automatic firearm in the direction of the vehicle
20 in which CI #1 was riding. *Id.* CI #1 stated that he/she saw Defendant fire numerous rounds over
21 a period of several seconds, and also saw CI #2 return fire. *Id.* CI #1 determined that no one had
22 been hit, and the vehicle in which CI #1 was riding then fled from Defendant’s vehicle. *Id.* at 8.

23 The affidavit states that CI #1 stated that Defendant is a member of the “documented criminal
24 street gang, San Chuco’s and that [Defendant] had a reputation and propensity for violence.” *Id.*
25 CI “1 knows that Defendant had been convicted in the past of weapon-related offenses, and had
26 served time in the Federal Bureau of Prisons. *Id.*

27

28

1 After CI #1 made these statements to Officers Forsberg and Ochoa, Officer Fellig, the affiant,
2 made contact with CI #2. *Id.* The affidavit states that CI #2 has “provided law enforcement with
3 specific, detailed information, that has been independently corroborated by investigators. The
4 information has also consisted of crimes against person offenses and weapon related offenses. Based
5 on the information provided by CI #2, criminal investigations have been initiated by law enforcement
6 and the informant has been deemed reliable.” *Id.* Specifically, the affidavit states that CI #2
7 previously provided the affiant with specific information of a male who was constructing improvised
8 zip guns that were capable of firing a small caliber round. *Id.* CI #2 gave the affiant the male’s exact
9 location, as well as information that the male was also in possession of a compact rifle, shotgun, and
10 revolver. *Id.* When a search warrant was later executed, the weapons CI #2 stated the male
11 possessed were recovered. *Id.*

12 Additionally, the affidavit states that CI #2 provided information in a separate investigation,
13 identifying three individuals who had been present for a homicide several years earlier. *Id.*
14 Independent investigation confirmed CI #2's information. *Id.* Further, the affidavit states that CI #2
15 provided specific information in an investigation into a male who was in possession of numerous
16 firearms that were being trafficked to criminal street gang members.” *Id.* at 9. Surveillance on the
17 specific location provided by CI #2 corroborated his/her information and, based on that information,
18 an investigation was initiated. *Id.*

19 The affidavit states that CI #2 told affiant that, on or about December 11, 2015, he/she was
20 operating a vehicle in the area of East Hickey and Statz. *Id.* CI #2 observed Defendant charging
21 his/her vehicle while on foot. *Id.* CI #2 then saw Defendant enter an orange Ford Explorer and
22 pursue his/her vehicle. *Id.* Defendant’s vehicle then intentionally struck CI #2's vehicle and, as the
23 vehicles continued to travel, Defendant “retrieved a black semi automatic pistol[] with his right hand
24 and began to discharge the firearm” at the CI #2's vehicle. *Id.* CI #2 stated that Defendant fired one
25 to three shots, and that his weapon was a “Glock” type pistol. *Id.* CI #2 further stated that, as the
26 cars continued to travel northbound on Statz, an unknown male who was standing near a parked
27 vehicle produced a pistol and, without provocation, fired at CI #2's vehicle. *Id.* at 9-10. CI #2 stated
28 that no one in his/her vehicle was struck by gunfire and that the vehicle was successful in fleeing the

1 area. *Id.* at 10. CI #2 denied returning gunfire during the incident. *Id.* Additionally, CI #2 stated
2 that Defendant had started intimidating him/her for an unknown reason in the days prior to the
3 shooting, but could not identify the specific cause of the shooting. *Id.*

4 The affidavit states that CI #2 stated he/she has physically been inside Defendant's residence
5 on East Hickey in the month of December 2015. *Id.* Further, he/she has been inside that location
6 in excess of ten times. *Id.* CI #2 noted that the residence has mounted visual surveillance
7 equipment. *Id.* This information was corroborated by law enforcement. *Id.* at 11. Additionally, CI
8 #2 has observed numerous firearms inside Defendant's residence, including a black Glock pistol and
9 a high caliber rifle. *Id.* at 10.

10 Both informants identified Defendant from a photograph as the person who fired at the
11 vehicle in which they were riding. *Id.* The East Hickey residence is the listed address for both
12 Defendant and his brother. *Id.* Law enforcement officers, while conducting surveillance on this
13 residence, obtained information that Defendant "was involved in illegal narcotics trafficking, as well
14 as crimes against persons." *Id.* During the course of surveillance, Defendant was specifically
15 observed operating the orange Ford Explorer, which is registered to his wife at the East Hickey
16 address. *Id.* at 11. During the investigation, this vehicle was always operated by Defendant, and not
17 by his wife. *Id.* at 12. On December 10, 2015, prior to the shooting for which CI #1 and CI #2 gave
18 information to law enforcement, surveillance team members noted that the vehicle had no obvious
19 damage to its rear window or front end. *Id.* at 11. On December 15, 2015, however, after the
20 shooting, surveillance members saw that the vehicle had front end damage to the bumper, and that
21 the rear windshield was broken. *Id.* The damage to the Explorer was "consistent in appearance and
22 location on the body, with what was described by CI #2." *Id.*

23 The affidavit further notes that Defendant has numerous arrests for violent and weapon
24 offenses, and is a convicted person required to register. *Id.* at 11-12. Additionally, the affidavit
25 states that Defendant was arrested in June 2015 for sexual assault, kidnapping, assault with a deadly
26 weapon, and domestic battery against his wife. *Id.* at 12. Finally, the affidavit notes that numerous
27 illegal shooting calls were received by North Las Vegas Dispatch during the time that CI #1 and CI
28 #2 report that Defendant shot at their vehicle. *Id.*

1 After reviewing the affidavit, North Las Vegas Township Justice of the Peace Kalani Hoo
2 issued a search warrant for Defendant's residence. *Id.* at 16-19. Law enforcement agents executed
3 the search warrant on December 23, 2015. Docket No. 42 at 7. During the search of the residence,
4 among other things, law enforcement recovered a Glock handgun. Docket No. 42-2 at 18.

5 On August 9, 2016, a federal grand jury sitting in Las Vegas, Nevada issued an indictment
6 charging Defendant with one count of felon in possession of a firearm, in violation of Title 18,
7 United States Code, Sections 922(g)(1) and 924(a)(2). Docket No. 1.

8 On April 5, 2017, Defendant filed a motion to suppress the evidence seized during the
9 execution of the search warrant. Docket No. 42.

10 **II. ANALYSIS**

11 **A. *Franks* Hearing**

12 In the first portion of his motion, Defendant states that Officer Fellig made materials
13 misrepresentations and omissions in his search warrant affidavit and, therefore, asks the Court to
14 conduct an evidentiary hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978) to determine
15 whether the affidavit was sufficient to establish probable cause.

16 Specifically, Defendant alleges that Officer Fellig failed to inform the issuing court of the
17 informants' criminal histories. Docket No. 42 at 9-10. Defendant contends that there is reason to
18 believe that the CIs have criminal histories "given their intimate knowledge about contraband, illegal
19 activities, and criminal street gangs, as well as their conflicting accounts of the shooting." *Id.* at 9.
20 Therefore, Defendant suggests that criminal histories should have been disclosed in the affidavit, in
21 case either CI has a conviction of a crime involving dishonesty. *Id.* Defendant submits that Officer
22 Fellig's "failure to alert the issuing court" of the criminal histories of the CIs "amounted to material
23 omissions." *Id.* at 10. Defendant next contends that Officer Fellig failed to provide context
24 regarding the shooting of December 11, 2015, that would inform the issuing court of the underlying
25 circumstances of the shooting. *Id.* Defendant contends that the conflicting information given by the
26 CIs about whether CI #2 fired back at him during the shooting, and whether a pedestrian shot at them
27 needs context. *Id.*

28

1 Defendant further contends that Officer Fellig misrepresented the NLVPD call log
2 information from the night of December 11, 2015. *Id.* at 11-12. Defendant submits that the affidavit
3 does not contain a period of time regarding the shooting, and that the call logs provided in discovery
4 do not support the CIs' information. *Id.* Next, Defendant contends that Officer Fellig made a
5 material misrepresentation in stating that police found the CIs' information to be credible, when he
6 also stated in an internal report dated January 5, 2016 that he lacked probable cause to arrest
7 Defendant for the shooting. *Id.* at 12.

8 In response, the United States contends that the search warrant was constitutionally valid, and
9 that Defendant has not made the requisite showing to entitle him to a *Franks* hearing. Docket No.
10 65 at 9-4. The United States submits that Defendant has failed to make an sufficient showing that
11 Officer Fellig's sworn affidavit contained "material misrepresentations or omissions that were
12 deliberately or recklessly made." *Id.* at 6. Specifically, the United States submits that Officer Fellig
13 included detailed prior instances where each CI was deemed reliable, as well as the details of the
14 contradictory statements given by each CI regarding whether CI #2 returned fire, so that the issuing
15 court could make an independent determination regarding probable cause. *Id.* Further, the United
16 States contends that Officer Fellig sufficiently informed the issuing court of the facts and
17 circumstances surrounding the December 11, 2015, shooting. *Id.* at 7. Additionally, the United
18 States notes that Defendant's arguments are focused on the veracity of the CIs, rather than the
19 veracity of the affiant, and the Court must consider the veracity of the affiant in making its
20 determination. *Id.* Further, the United States submits that Defendant has misinterpreted an internal
21 police document in arguing that Officer Fellig did not have probable cause to search his residence.
22 *Id.* at 8. The United States submits that Defendant refers to a document in relation to the shooting
23 itself and that Officer Fellig needed to protect the identities of the CIs, and therefore did not intend
24 to disclose them in order to arrest Defendant for the shooting. *Id.* That decision, the United States
25 submits, has "nothing to do with the probable cause determination as to Officer Fellig's search
26 warrant affidavit." *Id.* The United States therefore submits that Defendant has failed to meet the
27 requirement for a *Franks* hearing. *Id.* at 8-9.

28

1 In reply, Defendant contends that he has met the standard for a *Franks* hearing. Docket No.
2 66 at 2. Defendant submits that the United States’ response demonstrates the need for a hearing.
3 *Id.* at 2-4. Further, Defendant submits, with no authority, that Officer Fellig “vouched for the CIs’
4 credibility and reliability” and, therefore, his credibility is at issue. *Id.* at 4.

5 In *Franks v. Delaware*, 438 U.S. 154 (1978), the Supreme Court addressed at length whether
6 a false statement by a government affiant invalidates a search warrant. *United States v. Hammett*,
7 236 F.3d 1054, 1058 (9th Cir. 2001) (citation omitted). Under certain circumstances, a defendant
8 is entitled to an evidentiary hearing to afford the defendant an opportunity to attack the veracity of
9 a facially-valid affidavit used to support a search warrant. A defendant can challenge a facially valid
10 affidavit by making a substantial preliminary showing that “(1) the affidavit contains intentionally
11 or recklessly false statements or misleading omissions, and (2) the affidavit cannot support a finding
12 of probable cause without the allegedly false information.” *United States v. Reeves*, 210 F.3d 1041,
13 1044 (9th Cir. 2000) (citing *United States v. Stanert*, 762 F.2d 775, 780-81 (9th Cir. 1985)).

14 Before a criminal defendant is entitled to go beneath the search warrant to obtain additional
15 information concerning the police investigation and an informant, he or she is required to make a
16 substantial threshold showing. A defendant’s preliminary showing cannot be “merely
17 conclusionary.” *Reeves*, 210 F.3d at 1044. “There must be allegations of deliberate falsehood or
18 reckless disregard for the truth, and these allegations must be accompanied by an offer of proof.”
19 *Hammett*, 236 F.3d at 1058 (quoting *Franks*, 438 U.S. at 171). “To justify a hearing, a defendant
20 must make specific allegations, allege a deliberate falsehood or reckless disregard for the truth, and
21 accompany such a claim with a detailed offer of proof.” *United States v. Craighead*, 539 F.3d 1073,
22 1080 (9th Cir. 2008) (citation omitted). See also *Franks*, 438 U.S. at 171 (given the assumption of
23 validity underlying a supporting affidavit, a party moving for a *Franks* hearing must submit
24 “allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must
25 be accompanied by an offer of proof”). The movant bears the burden of proof and must make a
26 substantial showing to support both elements. See *United States v. Garcia-Cruz*, 978 F.2d 537, 540
27 (9th Cir. 1992).

28

Intentional or reckless omissions may provide grounds for a *Franks* hearing. *United States v. Jawara*, 474 F.3d 565 (9th Cir. 2007)); *see also United States v. Stanert*, 762 F.2d 775, 781 (9th Cir. 1985) (“By reporting less than the total story, an affiant can manipulate the inferences a magistrate [judge] will draw. To allow a magistrate [judge] to be misled in such a manner could denude the probable cause requirement of all real meaning”). Although “[c]lear proof of deliberate or reckless omission is not required,” a “[d]efendant ‘must offer direct evidence of the affiant’s state of mind or inferential evidence that the affiant had obvious reason for omitting facts in order to prove a deliberate falsehood or reckless disregard.’” *United States v. Souffront*, 338 F.3d 809, 822-23 (7th Cir. 2003). A defendant must also show that the “affidavit, once corrected and supplemented,” would not “provide ... a substantial basis for concluding that probable cause existed.” *Stanert*, 762 F.2d at 782. “[T]he omission rule does not require an affiant to provide general information about every possible theory, no matter how unlikely, that would controvert the affiant’s good-faith belief that probable cause existed for the search.” *Craighead* 539 F.3d at 1081.

The Ninth Circuit has identified five requirements that a defendant must satisfy before he is entitled to a *Franks* hearing:

- (1) the defendant must allege specifically which portions of the warrant affidavit are claimed to be false; (2) the defendant must contend that the false statements or omissions were deliberately or recklessly made; (3) a detailed offer of proof, including affidavits, must accompany the allegations; (4) the veracity of only the affiant must be challenged; and (5) the challenged statements must be necessary to find probable cause.

United States v. Perdomo, 800 F.2d 916, 920 (9th Cir. 1986) (quoting *United States v. DiCesare*, 765 F.2d 890, 894-895 (9th Cir. 1985)). Defendant has failed to satisfy all but the first requirement.

Defendant has alleged specifically which portions of the affidavit he submits contain either omissions or misstatements, which satisfies the first requirement. The Court finds, however, that Defendant has not made a substantial preliminary showing that the omissions and/or misstatements were deliberately or recklessly made, as per the second requirement. Further, Defendant has not met the third requirement, as he fails to make a detailed offer of proof to accompany his allegations. Additionally, Defendant has not met the fourth requirement, as he challenges the veracity of the CIs, not the affiant. The Court is not persuaded by Defendant’s contention that he is challenging the

1 affiant's veracity because the affiant vouched for the CIs, particularly where the affiant included the
2 conflicting statements made by the CIs regarding CI #2 returning fire. "Allegations that statements
3 reported in the affidavit and made to the affiant are false are not sufficient to satisfy the requirements
4 for a *Franks* hearing unless the defendant contends that the affiant has misrepresented the statements
5 made by another." *Perdomo*, 800 F.2d at 921. *See also United States v. Staves*, 383 F.3d 977, 983
6 (9th Cir. 2004); *United States v. Kiser*, 716 F.2d 1268, 1271 (9th Cir. 1983) ("The offer of proof [for
7 a *Franks* hearing] must challenge the veracity of the affiant, not that of his informant"). Here,
8 Defendant has made no claim that Officer Fellig incorrectly reported the statements made to him by
9 either CI and, therefore, he has challenged the veracity of the CIs, not the affiant.

10 Finally, Defendant has failed to meet the fifth requirement, as he has not shown that the
11 challenged statements are necessary to probable cause. Defendant submits that Officer Fellig did not
12 include the criminal histories of the CIs in his affidavit. Even if Defendant had made the appropriate
13 showing that this omission was deliberately or recklessly made, however, when an affidavit omits an
14 informant's criminal history (if that history includes crimes of dishonesty), "additional evidence must
15 be included in the affidavit 'to bolster the informant's credibility or the reliability of the tip.'" *United*
16 *States v. Elliot*, 322 F.2d 710, 716 (9th Cir. 2003) (internal quotation omitted). The Court therefore
17 finds that, even if either CI's criminal history contained crimes of dishonesty, the affidavit provided
18 enough information about their reliability that such omission does not impact probable cause. *See*
19 *United States v. Reeves*, 210 F.3d 1041, 1045 (9th Cir. 2000) (additional evidence in affidavit that
20 "informant had previously provided truthful and reliable information to police that led to three other
21 search warrants, narcotics arrest and convictions" outweighed concerns raised by undisclosed criminal
22 history). Defendant also submits that the call logs do not support Officer Fellig's contention that the
23 shooting occurred. The Court finds that no showing has been made that this is a misstatement that
24 was made intentionally or with reckless disregard for the truth and, in any event, the omission of the
25 call logs would not affect probable cause due to the statements of the CIs.

26 Finally, Officer Fellig's report, submitted on January 5, 2016, states that no victims came
27 forward at the time of the shooting. Docket No. 42-1 at 3. The United States submits that Officer
28 Fellig wanted to protect the CIs' identities. The Court finds that this report does not show that Officer

1 Fellig made a knowing misrepresentation, or a misrepresentation in reckless disregard for the truth
2 in the affidavit. Even if Defendant could make a preliminary showing, the Court finds that it would
3 not be material.

4 Accordingly, Defendant has failed to show materiality - that the inclusion of the omissions
5 and omission of other statements would negate the probable cause in the affidavit. The probable
6 cause standard for a search warrant is whether, based on common sense considerations, there was “a
7 fair probability that contraband or evidence of a crime [would] be found in a particular place.” *United*
8 *States v. DeLeon*, 979 F.2d 761, 764 (9th Cir.1992) (citing *Illinois v. Gates*, 462 U.S. 213, 238
9 (1983)). The magistrate judge need not determine “that the evidence is more likely than not to be
10 found where the search takes place.... The magistrate [judge] need only conclude that it would be
11 reasonable to seek the evidence in the place indicated in the affidavit.” *United States v. Ocampo*, 937
12 F.2d 485, 490 (9th Cir.1991) (citation and internal quotation marks omitted). Neither certainty nor
13 a preponderance of the evidence is required. *United States v. Kelley*, 482 F.3d 1047, 1050–51 (9th
14 Cir. 2007), citing *Gates*, 462 U.S. at 246 and *United States v. Gourde*, 440 F.3d 1065, 1069 (9th Cir.
15 2006) (*en banc*).

16 Probable cause is “a fluid concept turning on the assessment of probabilities and the particular
17 factual context not readily, or even usefully, reduced to a neat set of legal rules,” and its existence
18 must be determined by an analysis of the totality of the circumstances surrounding the intrusion.
19 *Gates*, 462 U.S. at 232. Probable cause does not deal with hard certainties, but with probabilities.
20 *Id.* at 241; *see also Brinegar v. United States*, 338 U.S. 160, 175 (1949) (Probable cause deals with
21 “probabilities” which are not technical, but factual and practical considerations of everyday life on
22 which reasonable and prudent people, not legal technicians act). As noted above, the Supreme Court
23 defines probable cause to search as “a fair probability that contraband or evidence of a crime will be
24 found in a particular place.” *Gates*, 462 U.S. at 238. *Gates* makes clear that the determination of
25 probable cause is made by examining the “totality of the circumstances.” *Id.* The United States
26 Supreme Court has repeatedly emphasized that the probable cause standard is a “practical,
27 non-technical conception.” *Brinegar*, 338 U.S. at 175.

28

1 The *Gates* decision made it clear that a court's decision regarding probable cause should be
2 given great deference. The duty of a reviewing court is to insure that the issuing court had a
3 substantial basis for concluding that probable cause existed. A reviewing court is required to examine
4 all circumstances set forth in the affidavit, and in doubtful cases, to give preference to the validity of
5 the warrant. *United States v. Peacock*, 761 F.2d 1313, 1315 (9th Cir.), *cert. denied*, 474 U.S. 847
6 (1985).

7 The Supreme Court has declined to articulate a "neat set of legal rules" for evaluating
8 probable cause, *id.* at 232, and instead has instructed magistrate judges to determine probable cause
9 by considering the "totality-of-the-circumstances," *Gates*, 462 U.S. at 230. In issuing a search
10 warrant, the magistrate judge simply must determine whether there is a "fair probability" that
11 evidence of a crime will be found. *Id.*, 462 U.S. at 238, 246. In looking at the totality of the
12 circumstances, the Court finds that a fair probability existed that evidence of a crime would be
13 discovered in the location specified in the affidavit. *See Gates*, 462 U.S. at 230-31.

14 In sum, Defendant has not made a substantial preliminary showing that the affidavit contains
15 material misleading omissions and/or misstatements that, if included or deleted, would have negated
16 probable cause. Accordingly, the Court finds that a *Franks* hearing is unnecessary, and Defendant's
17 request for a *Franks* hearing is denied.

18 **B. Nighttime Search Clause**

19 Defendant submits that the warrant is invalid because it contains a nighttime search clause and
20 the affidavit does not establish probable cause to justify a nighttime search. Docket No. 42 at 14.
21 Defendant submits that the justification for the nighttime search clause was to give law enforcement
22 the option of executing the search warrant when children were not around; however, Defendant
23 contends that children could be in the vicinity of the residence at any time. *Id.* at 15. Further,
24 Defendant submits that, while executing the search warrant, law enforcement blockaded the residence
25 with two armored vehicles, detonated flash bangs in the front yard, projected messages over a loud
26 speaker, and sent a robot into the home. *Id.* Defendant submits that these actions "undermine[] the
27 claim that police were concerned about the neighborhood children." *Id.* Finally, Defendant submits
28 without authority that, even though law enforcement executed the search warrant during daylight

1 hours, the warrant is nonetheless invalid due to the lack of probable cause for the nighttime search
2 clause. *Id.*

3 In response, the United States submits that the affidavit sufficiently justified the nighttime
4 search clause. Docket No. 65 at 9. The United States submits that an elementary school is located
5 approximately 0.4 miles away from Defendant's residence and that it is therefore "reasonable to
6 assume that children will be using the school property for activities while on winter break. For the
7 safety of the children[,] the search warrant was executed during the nighttime." *Id.* The United States
8 further submits that the nighttime search requirement is based on a federal rule, rather than a
9 constitutional mandate. *Id.* Therefore, even if the Court finds that the affidavit did not sufficiently
10 justify the nighttime search clause, the United States contends that the search itself was constitutional
11 and the evidence recovered during the search should not be suppressed. *Id.* at 10.

12 In reply, Defendant submits that the discovery indicates the warrant was not executed at night,
13 but the United States' response brief indicates it was executed at night. Docket No. 66 at 5-6.
14 Defendant therefore submits that a hearing is necessary "to determine when the search occurred and
15 whether exigent circumstances justified an intrusive nighttime search." *Id.* at 5.

16 The search warrant affidavit states

17 Affiant requests that a night time clause be authorized due to the fact that
18 [Defendant's residence] is located within a residential neighborhood, numerous
19 children are absent from local schools for winter break, on 12/22/15 at approximately
20 0800 hours, children were observed walking within close proximity to [Defendant's
21 residence], Tom Williams Elementary School is located within approximately 0.4
miles from [Defendant's residence] and its [sic] reasonable to assume that children
will be utilizing the schools [sic] property for activities while on winter break. A
nighttime clause would give Affiant the option of serving the search warrant when it
would not endanger these innocent children.

22 Docket No. 42-1 at 14.

23 Federal Rule of Criminal Procedure 41(e)(2)(A)(ii) states, in relevant part, that a search
24 warrant must command the law enforcement officer to "execute the warrant during the daytime,
25 unless the judge for good cause expressly authorizes execution at another time[.]" "Daytime" means
26 the hours between 6:00 a.m. and 10:00 p.m. according to local time." Fed.R.Crim.P. 41(a)(2)(B).
27 The Ninth Circuit has stated that, unless a clear constitutional violation occurs, failure to comply with
28 Rule 41 "requires suppression of evidence only where, (1) there was 'prejudice' in the sense that the

1 search might not have occurred or would not have been so abrasive if the Rule had been followed,
2 or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule.” *United*
3 *States v. Stefanson*, 648 F.2d 1231, 1235 (9th Cir. 1981) (internal citation and quotation marks
4 omitted). *See also United States v. Ritter*, 752 F.2d 435, 441 (9th Cir. 1985) (“the settled rule in the
5 Ninth Circuit is that a purely technical violation of Rule 41 does not require the suppression of
6 evidence otherwise legally obtained”). “[A]lthough the procedural steps enumerated in Rule 41(d) are
7 important and should not be disregarded, they are ministerial and ‘[a]bsent a showing of prejudice,
8 irregularities in these procedures do not void an otherwise valid search.’” *Frisby v. United States*,
9 79 F.3d 29, 32 (6th Cir. 1996) (quoting *United States v. McKenzie*, 446 F.2d 949, 954 (6th Cir.1971)).

10 The Court rejects Defendant’s argument that a nighttime clause can be approved only for
11 exigent circumstances, as the plain language of the rule states that the issuing judge must find that
12 good cause exists for the clause. Fed.R.Crim.P. 41(e)(2)(A)(ii). Additionally, the case that Defendant
13 cites for that proposition cites the rule as requiring reasonable cause for a nighttime clause and states
14 that the rule “has been interpreted to require both specific authorization for an intrusive nighttime
15 search, and that sufficient facts in the affidavit must support” the magistrate judge’s authorization.”
16 *Stefanson*, 648 F.2d at 1237. Further, the Court finds that Officer Fellig’s statements in the affidavit
17 regarding the presence of innocent children near Defendant’s residence, the elementary school less
18 than half a mile away, the reasonable belief that children would use the elementary school’s property
19 during winter break, and his desire not to endanger such innocent children constitutes good cause for
20 the issuance of a nighttime search clause. Accordingly, whether the search actually occurred at night
21 or not is not relevant.

22 In any event, even if the Court found that good cause did not exist for the issuance of the
23 nighttime clause, the remedy is not suppression. The Court has already found that probable cause
24 exists for the issuance of the search warrant, thus the search was valid. Further, Defendant has not
25 even attempted to demonstrate any sort of prejudice, much less the type required by the caselaw,
26 resulting from the nighttime clause and the possible nighttime search. Therefore, exclusion of the
27 evidence is not appropriate. *See Stefanson*, 648 F.2d at 1235; *United States v. Searp*, 586 F.2d 1117,
28 1125 (6th Cir. 1978).

ORDER

Based on the foregoing and good cause appearing therefore,

IT IS HEREBY ORDERED that Defendant's request for a *Franks* hearing is **DENIED**.

RECOMMENDATION

Based on the foregoing and good cause appearing therefore,

IT IS RECOMMENDED that Defendant's Motion to Suppress be **DENIED**.

NOTICE

Pursuant to Local Rule IB 3-2 **any objection to this Report and Recommendation must be in writing and filed with the Clerk of the Court within 14 days of service of this document.** The

Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985).

This Circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly address and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

DATED this 15th day of August, 2017.



NANCY J. KOPPE
United States Magistrate Judge